Office-Supreme Court, U.S.
FILED
AUG 18 1981
ALEXANDER L. STEVAS,
CLERK

No. 80-2180

In the Supreme Court of the United States

OCTOBER TERM, 1980

MCROBERTS PROTECTIVE AGENCY AND
STATE INSURANCE FUND, PETITIONERS
v.
SAMUEL ARBEENY, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENT

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QUESTION PRESENTED

Whether pier guards, whose principal duty is to maintain the security of cargo during the loading and unloading process, are "engaged in maritime employment" within the meaning of Section 2(3) of the Longshoremen's and Harbor Workers' Compensation Act.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-6a) is reported at 642 F. 2d 672. The opinions of the Benefits Review Board (Pet. App. 7a-19a) are reported at 12 B.R.B.S. 435 and 12 B.R.B.S. 473. The decisions and orders of the administrative law judges (Pet. App. 20a-24a; A. 73-83) are not reported.[1]

JURISDICTION

The judgment of the court of appeals was entered on March 9, 1981. The petition for a writ of certiorari was filed on June 8, 1981 (a Monday). The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

[1] "A." refers to the joint appendix in the court of appeals.

STATEMENT

1. Petitioner McRoberts Protective Agency provides a maritime security service for 15 clients in the Port of New York and New Jersey (A. 76). Respondents Samuel Arbeeny and Michael Conlon were employed as pier guards by McRoberts. Their primary responsibility was surveillance of cargo on piers, docks, and other marine terminal areas to protect against theft, fire, and vandalism. Arbeeny and Conlon performed most of their guard work on the pier, but they were required to board ship during loading and unloading operations and at some other times. They regularly worked on the gangways and decks or at the ship's hatch to ensure the security of cargo on the vessel and the security of the vessel and its equipment (Pet. App. 4a, 21a-22a; A. 74). Arbeeny on occasion counted cargo at the ship's hatch with a "checker" who was responsible for checking and recording cargo removed from the hold (Pet. App. 4a). Arbeeny kept a separate count of valuable cargo and also kept a record of damaged cargo (A. 37, 45, 53-54). Conlon often boarded docked vessels to deliver cargo manifests or to obtain manifests for shipments that had already been unloaded. Conlon also checked mooring lines to ensure that vessels were securely moored (Pet. App. 4a). Respondents, like all pier guards employed by McRoberts, required a Coast Guard pass, and were subject to the rules and regulations of the Waterfront Commission of New York and New Jersey (A. 61, 76).

Both Arbeeny and Conlon were injured on piers in the course of their employment (Pet. App. 3a). On January 17, 1974, while working on a covered pier, Arbeeny was injured when he was struck by a hi-lo (fork lift) machine operated by a longshoreman (Pet. App. 22a). Conlon was injured on February 20, 1978, when he slipped on ice and fell while making his rounds (Pet. App. 16a-17a).

2. Respondents Arbeeny and Conlon filed claims for compensation under the Longshoremen's and Harbor Workers' Compensation Act, 33 U.S.C. 901 *et seq.* Petitioner McRoberts and its insurance carrier, petitioner State Insurance Fund, disputed the claims, asserting that the claimants were not "engaged in maritime employment" within the meaning of Section 2(3) of the Act, 33 U.S.C. 902(3), and therefore were not entitled to compensation under the statute. In separate proceedings, two administrative law judges reached opposite conclusions. One judge determined that Conlon was engaged in maritime employment and awarded him compensation under the Act (A. 73-83). The other judge ruled that Arbeeny was not engaged in maritime employment and, accordingly, rejected his claim (Pet. App. 20a-24a).

In each case the losing party appealed to the Benefits Review Board under 33 U.S.C. 921(b). In divided decisions, the Board ruled that Arbeeny and Conlon were not covered by the Act. In the Arbeeny appeal, the Board recognized that "theft along the waterfront is a major problem of the longshoring industry" but concluded nevertheless that Arbeeny's guard duties were not "an integral part of longshoring operations" (Pet. App. 10a). The Board stated (*id.* at 11a-12a) that security guard employment "lack[s] the realistically significant relationship to maritime activities involving navigation and commerce required by" the Board's earlier decision in *Sedmak* v. *Perini North River Associates*, 9 B.R.B.S. 378, rev'd *sub nom. Fusco* v. *Perini North River Associates*, 601 F. 2d 659 (2d Cir. 1979), vacated and remanded, 444 U.S. 1028 (1980), on remand, 622 F. 2d 1111, cert. denied, Nos. 80-639 & 80-651 (Jan 26, 1981). In the Conlon appeal, the Board simply observed that its decision was "controlled by our determination in [the Arbeeny] case that a claimant whose principal duties involve guarding cargo is not an employee within the meaning of Section 2(3) of the Act" (Pet. App. 17a).

3. Respondents sought judicial review of the Board's decisions under 33 U.S.C. 921(c), and the cases were consolidated on appeal. The court of appeals reversed, holding that Arbeeny and Conlon were engaged in maritime employment within the meaning of the Act (Pet. App. 1a-6a). The court stated that claimants' guard duties were "an integral part of the loading and unloading of cargo" (Pet. App. 6a). The court explained its reasoning as follows (*ibid.*; footnote omitted):

> Pilferage of cargo is endemic at piers. The loading and unloading process presents innumerable opportunities for theft. The major function of [Arbeeny and Conlon] was to protect against the loss of cargo which in our view unquestionably serves a maritime purpose—the safe transit of goods shipped by sea. The pervasive surveillance conducted by guards on the pier and occasionally on board ship is essential to the longshoring operation and is indeed required by the International Longshoremen's Association during the loading and the unloading process.

DISCUSSION

The court of appeals correctly applied this Court's decisions regarding coverage under the Longshoremen's and Harbor Workers' Compensation Act to the particular facts of this case. The court's ruling regarding compensation for security guards on docks and piers does not conflict with the views of any other circuit and does not warrant further review.

1. In *P.C. Pfeiffer Co.* v. *Ford*, 444 U.S. 69 (1979), this Court held that the "maritime employment" coverage test of Section 2(3) of the Act is satisfied by all workers "engaged in intermediate steps of moving cargo between ship and land transportation" (444 U.S. at 83). And in *Northeast Marine Terminal Co.* v. *Caputo*, 432 U.S. 249 (1977), the Court ruled that cargo "checkers," who do not

actually move cargo but identify and record it in its transfer between land and sea transportation, are "engaged in maritime employment" because their work is an "integral part" of the loading and unloading process (*id.* at 271). The court of appeals correctly applied these principles in this case.

The court, after making the undisputed observation that cargo pilferage is a pervasive problem and that "[t]he loading and unloading process presents innumerable opportunities for theft" (Pet. App. 6a), concluded that the claimants' primary duty, guarding against cargo theft, "unquestionably serves a maritime purpose—the safe transit of goods shipped by sea" and is "essential to the longshoring operation" (*ibid.*). For this reason, the court properly determined (*id.* at 5a-6a) that the functions of the pier guards, like the functions of the checker in *Caputo*, are an "integral part" of the longshoring process, because both are critical if maritime cargo is to reach its destination.[2]

2. Petitioners mistakenly assert (Pet. 7, 11-13) that the decision of the court of appeals rests on the fact that the claimants' work regularly took them aboard ships. Having

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[2]Contrary to petitioners' assertion (Pet. 12), this case is distinguishable from *Maher Terminals, Inc.* v. *Farrell*, 548 F. 2d 476 (3d Cir. 1977), in which the Third Circuit held that a marine terminal office employee was not covered by the Act. The security functions of the pier guards here are far more closely related to the longshoring process than were the functions of a purely clerical employee who did not work on a pier, dock, or vessel and who was not directly involved in the movement of cargo. The court of appeals' holding that the pier guards' work is integrally related to the longshoring process is consistent with the decisions of other courts that, for example, workers who maintain and repair the machinery, equipment, and facilities used in longshoring operations are covered by the Act. *E.g.*, *Hullinghorst Industries, Inc.* v. *Carroll*, 650 F. 2d 750 (5th Cir. 1981); *Garvey Grain Co.* v. *Director, OWCP*, 639 F. 2d 366 (7th Cir. 1981); *Prolerized New England Co.* v. *Benefits Review Board*, 637 F. 2d 30, 37-38 (1st Cir. 1980), cert. denied, No. 80-1609 (June 15, 1981); *Price* v. *Norfolk & Western Ry.*, 618 F. 2d 1059, 1061-1062 (4th Cir. 1980); *Brady-Hamilton Stevedore Co.* v. *Herron*, 568 F. 2d 137, 140-141 (9th Cir. 1978).

characterized the decision in this way, petitioners contend that it is inconsistent with this Court's emphasis on the nature of a claimant's occupation in *P.C. Pfeiffer Co.* v. *Ford, supra.* But petitioners' premise is incorrect. The court of appeals based its decision primarily on its determination that the guards' security functions are an integral element of the longshoring process, and only incidentally noticed the location of the guards' work.

Moreover, the fact that respondents' work regularly took them on and off ships furnishes an entirely proper alternative ground for the court of appeals' ruling, and this Court's decision in *P.C. Pfeiffer Co.* v. *Ford, supra,* does not stand for a contrary proposition. In *Ford,* the Court considered only whether certain kinds of work, even if performed entirely on land, were covered by the Act. In that context, the Court rejected the proposition that only work performed in part aboard vessels can be deemed "maritime employment." The court did not need to, and did not, consider whether some kinds of work, regularly performed in part aboard a vessel, may nevertheless fall outside the scope of "maritime employment," as that term is used in Section 2(3) of the Act. The Court did, however, observe in passing that a central objective of the 1972 amendments to the Act was "to ensure that a worker who could have been covered part of the time by the pre-1972 Act would be completely covered by the 1972 Act" (444 U.S. at 75). Arbeeny and Conlon fall within this description, because the shipboard parts of their work were unquestionably covered by the pre-1972 Act on the basis of their location. *E.g., Calbeck* v. *Travelers Insurance Co.,* 370 U.S. 114 (1962).

3. The court of appeals' decision is supported by early cases holding that port guards were within the coverage of the original Longshoremen's Act. Before this Court's rulings in *Calbeck* and in *Davis* v. *Department of Labor,* 317

U.S. 249 (1942), the "maritime but local" doctrine limited coverage of the Longshoremen's Act to employment injuries that were beyond the constitutionally permissible reach of state workers' compensation laws. The Act covered injuries in which the employment was directly related to interstate or international maritime commerce, but not injuries where the employment, though performed on federal navigable waters, was "of local concern and of no direct relation to navigation and commerce." *Calbeck* v. *Travelers Insurance Co., supra,* 370 U.S. at 122. See *Sun Ship, Inc.* v. *Pennsylvania,* 447 U.S. 715, 717-719 (1980). Yet, even under that understanding of the coverage of the Act, the duties of port guards, to the extent performed aboard ship, were repeatedly held by the courts of appeals to be beyond the competence of state laws and hence within the Act's coverage. *Union Oil Co.* v. *Pillsbury,* 63 F. 2d 925 (9th Cir. 1933); *Seneca Washed Gravel Corp.* v. *McManigal,* 65 F. 2d 779 (2d Cir. 1933); *Lowe* v. *Central R.R.,* 113 F. 2d 413, 415 (3d Cir. 1940); *Hillcone S.S. Co.* v. *Steffen,* 136 F. 2d 965 (9th Cir. 1943). The "maritime but local" test is, of course, no longer the measure of the Act's coverage. See *Sun Ship, Inc.* v. *Pennsylvania, supra,* 447 U.S. at 720. Even under that narrow test, however, the early cases established the maritime character of port guards' work and thus support the court of appeals' decision here.

4. The decision of the court of appeals does not conflict with the ruling of any other court. Other cases involving the Act's coverage of port guards are pending before the Fifth Circuit (*Holcomb* v. *Robert W. Kirk Associates,* No. 80-5246 (argued Apr. 21, 1981)) and the Ninth Circuit (*Kelly* v. *Marine Terminals Corp.,* petition for review, No. 81-7999 (filed July 30, 1981)), and still others are pending before or have been decided by the Benefits Review Board and will be reviewed by other circuits. Intervention by the

Court at this time would therefore be premature, even assuming that the issue is one that would merit review should a conflict arise.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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AUGUST 1981

DOJ-1981-08